

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

United States of America)	Cr. No. 6:08-676-HMH
)	
vs.)	
)	OPINION & ORDER
Simon Gutierrez-Gomez,)	
)	
Movant.)	

This matter is before the court on Simon Gutierrez-Gomez's ("Gomez") motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In his motion, Gomez alleges that his attorney, Paul Carruthers, Jr. ("Carruthers"), was constitutionally ineffective for failing to file an appeal as requested. (Gomez § 2255 Mot. 5.); (Gomez Aff. ¶ 4.)

Gomez pled guilty to one count of knowingly transferring, possessing, and using, without lawful authority, a means of identification on another person, on August 19, 2008. On January 5, 2009, Gomez was sentenced to twenty-four (24) months' imprisonment. Gomez did not file an appeal of his conviction. Gomez filed the instant § 2255 motion on August 5, 2009,¹ alleging that Carruthers refused to file an appeal as requested. (Gomez § 2255 Mot. 5.); (Gomez Aff. ¶¶ 4-6.)

An attorney's failure to file a direct appeal after a request from a client constitutes ineffective assistance of counsel. See United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993). When a prisoner alleges that his attorney failed to file an appeal as requested, the court has the authority to vacate the sentence and immediately reimpose and reinstate the movant's judgment

¹ See Houston v. Lack, 487 U.S. 266 (1988).

of conviction to allow the prisoner to appeal. See id. Therefore, the court hereby vacates Gomez's sentence and immediately reinstates and reimposes Gomez's judgment of conviction.

It is therefore

ORDERED that Gomez's § 2255 motion, docket number 35, is dismissed with leave to refile, his sentence is vacated, and his judgment of conviction is immediately reimposed and reinstated with the date of imposition of judgment being the filing date of this order.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
August 18, 2009

NOTICE OF RIGHT TO APPEAL REIMPOSED JUDGMENT OF CONVICTION

The movant is hereby notified that he has **TEN (10)** days from the filing date of this order in which to file a notice of intent to appeal his judgment of conviction, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure. Failure to meet this deadline will waive the right to appeal.

The notice immediately below relates only to movant's right to appeal this order and should not be confused with the ten-day period in which to file a notice of intent to appeal the judgment of conviction.

NOTICE OF RIGHT TO APPEAL

The movant is hereby notified that he has the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.